IN RE H. SOMAPAH DECEASED.

[Original Civil Jurisdiction (Aitken, J.) Nov. 11, 1941]

Trustees' personal liability for costs in case of gross negligence.

Trustees will not be ordered by the Court to pay the costs of legal proceedings affecting the trust estate unless such legal proceedings are the result of their own serious misconduct or gross negligence. But where unnecessary proceedings are begun as the direct result of such gross negligence the trustees must pay all these costs personally, because all these costs have been occasioned by their own gross negligence in the discharge of their fiduciary duties.

Cases referred to:—

(1) *Glebe Sugar Refining Company Ltd. v. Trustees of the Port and Harbours of Greenock* 1921 W.N. 85.

(2) *Bartlett v. Wood* (1861) 9 W.R. 817.

(3) *Croggan v. Allen* (1882) 22 Ch. D. 101.

(4) *Re Ormston, Goldring v. Lancaster* (1887) 58 L.T. 74.

(5) *Re Cabburn, Gage v. Rutland* (1882) 46 L.T. 848.

(6) *In re Blake, Jones v. Blake* (1885) 29 Ch. D. 913.

(7) *Brown v. Burdett* (1889) 40 Ch. D. 244.

(8) *In re Weall, Andrews v. Weall* (1889) 42 Ch. D. 674.

(9) *In re Skinner, Cooper v. Skinner* (1904) 1 Ch. 289.

(10) *Heugh v. Scard* 33 L.T. 659.

(11) *In re England, Dobb v. England* (1918) 1 Ch. 24.

John Laycock and N. A. Mallal for plaintiffs and for the personal representatives of Mynee deceased, the testator's daughter, and the next of kin of the testator according to the law of the Colony at date of testator's death.

Roland Braddell and F. H. O'Reilly for defendants and the heir or heirs of the testator living at the date of distribution traced according to common law.

J. T. Haydon for class of persons who would be the next of kin of the testator if the testator had died at the date of distribution.

K. K. O'Connor for S. Basapah in his personal capacity as testator's eldest son and as such claiming to be the testator's heir at law.

Cur. adv. vult.

Aitken, J.—The testator, H. Somapah, acquired much valuable real property, mostly of freehold tenure, within the city and island of Singapore during his lifetime and died a wealthy man on the 28th of January 1919. At the date of his death his surviving natural children were:—

Somah Basapah (m), the second defendant;

Mynee (f), then the wife of Ram Mohan Singh and the mother of the two plaintiffs by a subsequent marriage; and

Jumnah (f), then the wife of the first defendant.

Jumnah died shortly after the testator, that is, on the 1st of August, 1919, leaving 7 children her surviving the majority of whom are alive to-day.

Just about four months before he died H. Somapah, with the assistance of his solicitor, made a will which pointed to a prolonged spell of litigation in the Supreme Court as surely as a compass needle points to the magnetic north. He appointed the first and second defendants and the said Ram Mohan Singh to be the executors and trustees thereof, and they duly proved it on the 8th of April, 1919. Ram Mohan Singh, however, died on the 15th of November, 1919, and the defendants are now the surviving executors and trustees of the testator's will.

Those provisions of the will which do not affect the testator's natural children and their descendants have no bearing whatever on the questions which these proceedings have raised for my decision, but it does appear to be desirable that I should set out, as concisely as possible, the provisions which the testator made for his three natural children and their descendants.

In the first place — paragraphs 3 and 4 — he set apart one house in Singapore for his son Somah Basapah and his family, and another house, also in Singapore, for his daughter Mynee and her family, giving his said son and daughter a life interest in their respective houses and directing that they should

respectively go to his or her children "as tenants in common in equal shares" upon the termination of such life interest.

Next — paragraph 9 — he directed payment of "the following monthly allowances to the undermentioned persons the same to be paid to them up to the date of distribution if they shall live so long: such allowance to cease at their death":

To my son Somah Basapah and his married wife	$200
To each of the children of the said Somah Basapah	$ 20
To my daughter Mynee and her husband ..	$100
To each of the children of the said Mynee ..	$ 20
To my eldest daughter Jumnah and her husband	$100
To each of the children of the said Jumnah ..	$ 20

In paragraph 10 the testator gave $300 by way of "marriage expenses" to each of his grandchildren.

Then, subject to the payment of these allowances and marriage expenses, and to certain other payments and expenses the testator — paragraphs 13 and 14 — directed his trustees to hold all his very considerable residuary estate until the expiration of a period of 21 years "from the date of the death of the last survivor of my children and grandchildren living at the time of my death," and to accumulate and invest all surplus income arising during the period "in the purchase of house property within 2 miles of the town of Singapore of freehold or leasehold tenure of 999 years".

Finally — paragraph 14 — upon the expiration of such period of 21 years from the date of the death of the last survivor of the testator's children and grandchildren living at the time of his death, the trustees are directed to convey and assign the whole of the testator's residuary estate to his heirs who may be living at the date of distribution in equal shares.

It is wills like this which afford the best arguments that a change in the law drastically curtailing the powers of testators is highly desirable and long overdue.

On the 20th of September, 1920, Somah Basapah and Goona Veragoo Naidoo, in their capacity of executors of the testator's will, took out an Originating Summons (No. 112 of 1920) to obtain a judicial decision on the meaning of the testator's final gift of his residuary estate to 'his heirs who may be living at the date of distribution in equal shares'. Messrs. Donaldson and Burkinshaw were then acting as their solicitors.

On the 5th of October, 1920, this Originating Summons was amended by striking out the name of Somah Basapah as an applicant and adding him as a defendant, and it was ordered that some person to be approved by the Registrar was to be appointed "to represent the class of persons who would be heirs and next of kin of the testator if he had died at the date of distribution mentioned in his will". It appears that this change of parties was made for the purpose of enabling Somah Basapah to contend that, in respect of the real property left by the testator in this Colony, he had, owing to the gift to the testator's "heirs", the same rights as would be vested in an heir if his ancestor had died when the testator did, but intestate and entitled to real property situate in England. The hearing of the Summons was adjourned into Court.

At the hearing, which took place on 29th and 30th of October 1920 before Barrett-Lennard J., Mr. R. L. Braddell of Messrs. Braddell Brothers appeared for the trustees, Mr. W. L. Stevens of Messrs. Donaldson and Burkinshaw appeared for Somah Basapah, the late Mr. E. R. Koek appeared for the testator's daughter Mynee, and some one from Messrs. Sisson & Delay represented "the class of persons who would be heirs and next of kin of the testator if he had died at the date of distribution mentioned in his will". I gather from the learned Judge's written judgment, which is dated the 11th of December 1920, that Mr. W. L. Stevens found it impossible to put forward any arguments in support of the contention which Somah Basapah was making.

The formal order upon this Originating Summons No. 112 of 1920 was not entered until the 12th of January, 1921, and the material part thereof reads as follows:—

> "The Court doth declare that upon the true construction of the will of Hunmah Somapah deceased the word "heirs" indicating the class to take the residuary estate must be construed as the next of kin of the testator, and that such next of kin are unascertainable until 21 years after the death of the survivor of the children and grandchildren of the testator living at the time of his death."

I have been unable to find Messrs. Sisson and Delay's bill of costs in respect of that Originating Summons, but the other three bills of costs amount to a total of $2,929.10, so that it is safe to assume that the settlement of the question as to whom the testator intended to designate by his "heirs" etc. must have cost the estate at least $3,500. It is also to be observed that on the 17th of January, 1921, Somah Basapah gave notice of appeal against the

whole of Barrett-Lennard J's judgment, but eventually withdrew it on some date I have been unable to ascertain. He evidently realised at that time that his pretensions to be the testator's heir had received a knockout blow from the learned Judge's judgment.

On the 2nd of August, 1923, Somah Basapah and Goona Veeragoo Naidoo, in their capacity of executors of the testator's will, took out another Originating Summons (No. 91 of 1923) to obtain a judicial decision on the question whether the gifts in paragraph 9 of the will "to each of the children of the said Somah Basapah" and "to each of the children of the said Mynee" included children born to Somah Basapah and Mynee respectively after the date of the testator's death. In that matter Messrs. Braddell Brothers acted for the executors, Messrs. Donaldson and Burkinshaw for Mynee as the guardian ad litem of her son Rajinder Singh born after the death of the testator, and Messrs. Sisson & Delay were appointed to represent and act for the next of kin living at the death of the testator or such other persons as may be entitled to the surplus income of the testator's estate.

The Originating Summons was adjourned into Court for argument, and it was held by Shaw C.J., (1) that the gifts of allowances "to each of the children of the said Somah Basapah" and "to each of the children of the said Mynee" included all the children of Somah Basapah and Mynee born at any time prior to the date of distribution of the corpus of the testator's residuary estate, and (2) that the said gifts of allowances are payable to any children born by any subsequent wife or husband of Somah Basapah and Mynee. The date of the formal order made on that Originating Summons is the 29th of April, 1924, and it appears to have cost the estate about $1,400 — $1,500 in all.

It is somewhat surprising to find that whilst Originating Summons No. 91 of 1923 was still awaiting the Court's decision yet another Originating Summons for the construction of the testator's will — No. 2 of 1924 — was taken out by the executors and trustees on the 9th of January 1924, and this time through the instrumentality of Messrs. Donaldson and Burkinshaw acting as their Solicitors. Thus, at one and the same time two different firms of Solicitors were acting for the same executors and trustees, and for the same general purpose of obtaining decisions of the Court on the true construction of his will.

Originating Summons No. 2 of 1924 raised the questions whether the provisions for the accumulation of surplus income contained in paragraphs 13 and 14 of the testator's will are void as offending against the Accumulations Act of 1800 (39 and 40 George III c. 58) and the Accumulation Act of 1892 (55 and 56 Victoria c. 58), and if void who are the persons entitled to such surplus income. In regard to those questions Messrs. Braddell Brothers were appointed to act for the heirs of the testator living at the expiration of the period of distribution, and Messrs. Sisson and Delay for the next of kin living at the death of the testator.

Those questions came before Shaw C.J. and were decided by him as follows (I quote from the formal order which bears the same date — the 29th of April 1924 — as the formal order on Originating Summons No. 91 of 1923):—

"The Court doth declare that the direction to accumulate income contained in paragraph 13 of the Will of the Testator Hunmah Somapah is invalid in so far as such direction exceeds a period of 21 years from the date of the death of the Testator the said Hunmah Somapah and that the next of kin living at the death of the said Testator are entitled to the surplus income after the expiration of the said period of 21 years AND DOTH FURTHER DECLARE that the directions contained in paragraph 13 and 14 of the said Will as to the expenditure and disposal of the surplus income are valid during the said period of 21 years."

That Originating Summons No. 2 of 1924 was not an expensive affair, and appears to have cost the estate some $1,100 only. From 1924 to 1931 the testator's estate appears to have been free from litigation with the exception of one small matter to which I will refer quite soon, but according to the pleadings in this suit — No. 242 of 1936 — the defendants, in their trustee capacity, had adopted an extraordinary system of administration in that each in turn took over the management of the trust property and each seems to have employed his own solicitors when he required professional advice. It is alleged that they accounted to one another during their respective periods of management.

In 1931 the testator's daughter Mynee commenced a suit in the nature of an administration action against the defendants as trustees of the testator's will, but discontinued the same at an early stage in the proceedings. Mynee died on the 25th of June 1935, and it would seem that the system of alternative management of the testator's estate by the defendants continued up to the date of her death and thereafter until the commencement of this suit — No. 242 of 1936 — on the 5th of June 1936, though not without friction between them and Mynee. I gather, too, from the records of this suit, that Somah Basapah has

been managing the testator's estate more often, and for longer periods, than Goona Veeragoo Naidoo.

Throughout the lengthy proceedings in this suit the first defendant, in his trustee capacity, has been represented by Messrs. Braddell Brothers and the second defendant, in his trustee capacity, by Messrs. Donaldson and Burkinshaw. Before I come to the Summons in Chambers — No. 254 of 1940 — which was taken out in this suit on the 5th of May 1940, there are three matters to which I think I should make a brief passing reference.

The first is the fact that on the 8th of April 1932 an order was made in Originating Summons No. 95 of 1930 allowing Goona Veeragoo Naidoo and Somah Basapah a remuneration of 5% of the gross income of the testator's estate collected by them up to that date without prejudice to a further application for remuneration after that date. According to his affidavit herein of the 16th of September, 1941, Somah Basapah had received $14,000 by way of such remuneration up to that 16th of September, and was claiming that a balance of $4,396.33 then remained due to him. Somah Basapah has also filed a further application for remuneration after the 8th of April 1932, which is now pending. I have been unable to trace any similar application on the part of Goona Veeragoo Naidoo, but I think it is only reasonable to assume that he, too, has received a substantial sum by way of remuneration under the order of the 8th of April 1932.

The second is the fact that an order for the accounts and enquiries usual in an administration suit was made in this suit on the 14th of September 1936. It has taken the defendants nearly four years to compile and render those accounts, and the surcharges and falsifications which the plaintiffs have filed there anent already number more than a thousand. I am afraid that the final grand total of the costs of taking those accounts will amount to a staggering figure, and it is worthy of remark that the bills of costs already taxed and paid out of the testator's estate in this suit amount to more than $36,000.

The third is the fact that Messrs. Cheong Koon Seng & Co. Ltd. were appointed Receivers and Managers of the testator's estate by an order made in this suit on the 23rd of October 1940, and are now in charge of the same as such Receivers and Managers..

And so I come to Summons in Chambers No. 254 of 1940, which was taken out in Suit No. 242 of 1936 by the second defendant Somah Basapah, acting through his solicitors Messrs. Donaldson & Burkinshaw, on the 15th of May 1940. It is addressed to "the abovenamed plaintiffs and to their solicitors Messrs. Mallal and Namazie, and to the abovenamed first defendant (i.e. Goona Veeragoo Naidoo) and to his solicitors Messrs. Braddell Brothers", and asks for the determination of the following questions arising in the administration of the estate of the said Hunmah Somapah deceased:—

(a) At what date the residuary estate of the said Hunmah Somapah deceased should be distributed among the persons entitled thereto.

(b) What person, persons or classes of persons are or will be entitled to share in the residuary estate of the said Hunmah Somapah deceased.

The Summons also asks for such representation orders as the Court may think necessary, and for directions as to service. It ends with a request that the Court will decide "how the costs of this application are to be borne", and that is what I have now got to decide.

This Summons would, of course, have been a perfectly proper summons for a trustee to take out had not Barrett-Lennard J. decided both the questions it propounds in Originating Summons No. 112 of 1920. It may make for clarity if I repeat, at this stage of my judgment, the material part of the formal order on that Originating Summons which was entered on the 12th of January 1921. It reads as follows:—

> The Court doth declare that upon the true construction of the will of Hummah Somapah deceased the word "heirs" indicating the class to take the residuary estate must be construed as the next of kin of the testator, and that such next of kin are unascertainable until 21 years after the death of the survivor of the children and grandchildren of the testator living at time of his death.

It is painfully obvious that this Summons in Chambers No. 254 of 1940 should not have been taken out, but further comment must await the completion of my narrative of facts.

Several additional affidavits were filed under this Summons in Chambers during May, June and July 1940, some of which raised questions as to the testator's domicile at the time of his death. As it was thought that that question of domicile might affect the decision of the question propounded in the Summons an order was made, on the 5th of July 1940, directing that an issue should be tried to decide whether the testator was on the 25th of September

1918, when he made his will, and/or on the 28th of January 1919, when he died, domiciled in British India or in the Straits Settlements.

That issue was tried on the 24th of October 1940, and the Court decided that the testator was domiciled in these Settlements at the time he made his will and at the time of his death. The costs of all parties "of and incidental and ancillary to" that issue were directed to be taxed as between solicitor and client and paid out of the testator's estate, and the total costs so allowed and paid amount to $4,296.

This Summons in Chambers No. 254 of 1940, was again before a Judge on the 4th of November 1940, when the following Order was made:—

"By consent IT IS ORDERED that for the purpose of this Summons in Chambers Messrs. Braddell Brothers be appointed to represent the abovenamed Goona Veragoo Naidoo and Somah Basapah as Trustees of the Estate of H. Somapah deceased and the heir or heirs of the testator living at the date of distribution traced according to common law and that Messrs. Donaldson & Burkinshaw be appointed to represent the class of persons who would be the next of kin of the testator if the testator had died at the date of distribution and that Messrs. Mallal & Namazie be appointed to represent the personal representatives of Mynee deceased the daughter of the testator, and the next-of-kin of the testator according to the law of this Colony ascertained at the testator's death AND IT IS FURTHER ORDERED that for the purposes of this Summons the said Somah Basapah be at liberty to instruct Counsel to represent him in his personal capacity namely that of the testator's eldest son and as such claiming to be the heir at law of the testator at his own risk as to costs AND IT IS LASTLY ORDERED that the rest of the Summons be adjourned into Open Court for argument."

On the 9th of November 1940, Messrs. Aditan & Co. were entered on the record as Somah Basapah's solicitor in place of Messrs. Donaldson & Burkinshaw.

For some reason or reasons unknown to me it was not until the 9th of October 1941 that Summons in Chambers No. 254 of 1940 was set down for hearing in open Court. On that date Messrs. Laycock and Mallal appeared for the plaintiffs and also, in accordance with the Order of the 4th of November 1940, for the personal representatives of the late Mynee and for the next of kin of the testator ascertained at the date of the testator's death. Messrs. Braddell and O'Reilly appeared for Goona Veeragoo Naidoo and Somah Basapah in their trustee capacity and also, in accordance with the order of the 4th of November 1940, for the heir or heirs of the testator living at the date of distribution traced according to the common law.

Mr. Haydon, in accordance with the same order, appeared for the class of persons who would be the next of kin of the testator had he died at the date of distribution.

Mr. O'Connor, in accordance with the same order, appeared for Somah Basapah in his personal capacity of the testator's eldest son and as such claiming to be the heir at law of the testator.

As soon as I had finished writing down the names of counsel, and the different persons and classes they were representing, Mr. Braddell announced that he had not the remotest conception who "the heir or heirs of the testator living at the date of distribution traced according to the common law" might be; and stated that he had always maintained that there can be no heirs-at-law in these Settlements. He asked to be relieved from any obligation to argue to the contrary.

As I could not compel Mr. Braddell to argue a proposition which he obviously deemed to be unarguable, and as the Order of the 4th of November 1940 clearly intended that some one should argue that particular proposition, I eventually gave way and appointed the Deputy Registrar Mr. Ess to represent "the heir or heirs of the testator living at the date of distribution traced according to the Common law" with liberty to instruct counsel to argue that such persons are the heirs mentioned in clause 14 of the testator's will. Thus it came about that I had to adjourn this matter after a discussion which lasted for 2½ hours and led us nowhere. The 23rd of October, 1941, was the date fixed for the next hearing.

Next day, the 10th of October 1941, Goona Veeragoo Naidoo said something to Mr. Braddell which caused the latter to institute a search amongst the records of this Court, with the result that the judgment of Barrett-Lennard J. in Originating Summons No. 112 of 1920 was discovered late in the same afternoon. I gather that he lost no time in communicating his discovery to all the other solicitors concerned in this matter, and the situation was clearly one which called for some explanation from the two firms which have been engaged in all litigation concerning the testator's estate from the year 1920 onwards.

An explanation has been furnished by affidavits sworn by Mr. Braddell on the 16th of October 1941, and by Messrs. C. H. Smith and J. T. Haydon on the 21st of that month respectively. From those affidavits it appears that all the solicitors and advocates who took any part in the proceedings under Originating Summons No. 112 of 1920, including the issue of the Summons itself, have either left the Colony or died since then. It also appears that both Messrs. Braddell Bros. and Messrs. Donaldson and

Burkinshaw have changed their office since 1920, in the case of Messrs. Donaldson and Burkinshaw on two separate occasions; and that many old papers were lost or destroyed in the course of such removals.

I accept this explanation without either hesitation or reserve, and am satisfied that this unfortunate Originating Summons reflects in no adverse way on the honour and integrity of any of the solicitors and advocates who have taken part in the proceedings thereunder. At the same time I am a little surprised to find that firms of solicitors and advocates, which have been acting for the executors and trustees of a testator's estate for a period commencing shortly after the testator's death and lasting for over 20 years, do not appear to have kept copies of all important documents relating thereto in one or more files suitably indexed for easy reference. It may well be, of course, that the constant change of personnel, and the combined functions of solicitor and advocate, render the management of a busy office out here more difficult than that of an old established firm of solicitors in England. Nevertheless I do venture to suggest that all solicitors and advocates should endeavour to keep such files as I have just mentioned, if only for the purpose of preventing the occurrence of any other application to the Court which can be likened to this one.

On the 23rd of October, 1941, it was agreed by all counsel engaged, that I could not make any order on this Summons in Chambers No. 254 of 1940 except an order as to costs.

Mr. Braddell said (inter alia):— "I think that the only costs now before Court are:—

(a) costs of the issue of Summons No. 254 of 1940;

(b) costs of the representation order of the 4th of November 1940;

(c) costs of the proceedings since then.

The three firms of solicitors and advocates appointed by the Order of 4th of November 1940 to represent different parties have not been guilty of any conduct which should deprive them of their costs. Somah Basapah has come in at his own risk, and may have to pay his own costs. I submit that no single person has done anything which would enable the Court to order him to pay everyone's costs."

Mr. Laycock said (inter alia):— "At the date of the representation order of the 4th of November 1940 none of the solicitors concerned knew of the judgment on Originating Summons 112 of 1940, but Goona Veeragoo Naidoo should have known and Somah Basapah must have known since he lodged an appeal, subsequently withdrawn, against the judgment of Barrett-Lennard J. The plaintiffs are entirely innocent, and cannot have known of Barrett-Lennard's judgment; so they should not be deprived of their costs. Braddell Bros: and Donaldson and Burkinshaw and Mallal & Namazie should only be allowed their costs from the date of the representation order, and my clients should be allowed their costs from the 15th of May 1941 on which date they were served with this Summons. I submit that plaintiffs should be allowed two counsel, as there would have been a difficult question to argue had the matter not been res judicata. My last submission is that all costs in this matter should be paid out of capital, because the Summons was taken out to determine questions relating to residue."

Mr. O'Connor said (inter alia):— "It is now agreed that this Summons is a trustees' summons — taken out by one trustee with the consent of the other trustee. The order (representation order) of the 4th of November 1940, gave Somah Basapah liberty to instruct counsel to represent him and argue that he was the testator's heir at his own risk as to costs. I suggest the only risk he runs is the fee he has paid to counsel to argue for him. The Court must not deprive him of any costs merely because it may think his point of view in regard to "heirs" rather selfish. I submit that no further inquiry would elucidate the position any further."

Mr. Haydon said, in reply to Mr. Laycock:— "Under paragraph 14 of the testator's will the testator endeavoured to dispose of a residue composed of capital and accumulated income. It has been held that the direction to accumulate is invalid, so that there is an intestacy as to income. So I submit that their burden of the costs to be allowed should not fall exclusively on those entitled at date of distribution. I suggest an apportionment between capital and income."

Finally Mr. Braddell, by way of general reply, said:— "This Summons was originally taken out by Somah Basapah. Quite true that costs prior to the representation order of the 4th of November 1940 will not be big, but there is no reason to deprive Goona Veeragoo Naidoo of his costs. Basapah's costs as trustee, from date of representation order, will be covered by the first part of the representation order."

At that time I knew very little indeed about the litigious history of this estate, and was in no position to obtain further assistance from counsel by apt questioning. Nevertheless, it struck me at the time that I might have received a little more assistance in regard to the law applicable to a situation like the one which was disclosed. Not a single authority was cited to me: not a single line from any text book. I hope that counsel will not take it amiss if, in this connection, I invite their attention to Lord Birkenhead's remarks in *Glebe Sugar Refining Company Ltd. v. Trustees of the Port and Harbours of Greenock*[1].

The costs with which I have to deal are:—

(a) The costs of the issue of the Originating Summons No. 254 of 1940,

(b) The costs of the representation Order of the 4th of November 1940, and

(c) The costs of the proceedings which have taken place since the date of that order.

The costs of the issue as to the testator's domicile have already been allowed and paid out of the estate, and I cannot reverse or vary the order allowing them.

Order 62 rule 1 is the Order and rule of our Supreme Court Rules under which I must proceed. It reads as follows:—

"1.—(1) Subject to these rules, the costs of and incidental to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge.

(2) Nothing herein shall deprive an executor, administrator, trustee, or mortgagee, who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon."

This rule reproduces, with a few immaterial variations, Order 65 rule 1 of the Rules of the Supreme Court of England; and it seems to me that the English authorities interpreting and explaining that rule should guide the Judges of the local Supreme Court when they are called upon to decide such questions as those now before me.

Some ten or more of those authorities, to be found at page 274 of Volume 33 of the 2nd edition of *Halsbury's* Laws of England, have established the principle that trustees will not be allowed to charge against the trust property the costs of unnecessary proceedings. It is admitted on all hands that the issue of this Originating Summons No. 254 of 1940, and all the proceedings which have taken place thereunder, are unnecessary in the highest possible degree; and no reason has been suggested to me, nor can I think of any, why I should not apply the principle which I have just enunciated to the trustees' costs thereof. I shall therefore do so, and the first and second defendants will not be allowed any of their costs of these proceedings out of the testator's estate (except their costs of the testator's domicile issue over which I have no control).

On the other hand the plaintiffs, who cannot have known of the judgment of Barrett-Lennard J. in Originating Summons No. 112 of 1920, are innocent parties and cannot, on any principles of justice, be deprived of their costs of this Originating Summons and all the proceedings which have taken place thereunder. So, too, the solicitors and advocates who were appointed to represent various interests by the Order of the 4th of November, 1940, are free from blame in that respect and have only carried out their duties under the Order. All these costs must be provided for somehow, and it seems to me that they must either be allowed out of the testator's estate or paid by the trustees personally.

Mr. O'Connor has asserted that no further inquiry would elucidate the circumstances in which this Originating Summons, No. 254 of 1940, was taken out. I don't find myself entirely in agreement with that proposition, but since I have no power to cross-examine the trustees and others on that subject I must be content to leave much in obscurity. One fact, however, does stand out clear beyond the possibility of doubt, and that is the fact that the proceedings under this Originating Summons were unreasonably instituted and quite unnecessary.

Even though the second defendant, knew enough about the judgment of Barrett-Lennard J. to lodge an appeal against it, yet there is nothing in the meagre evidence before me which would justify a finding of deliberate misconduct on the part of either trustee. On the other hand that judgment of Barrett-Lennard J. was of the greatest importance to both of them, if they had any desire to carry out their fiduciary duties properly, and to all persons claiming any interest in the testator's estate; and it was their plain duty to familiarise themselves with its terms and to keep a copy of it handy for their guidance. In this connection it is pertinent to observe that both these trustees are educated men who understand the English language and can read, write and speak it fluently.

In all the circumstances of this matter it seems to me that the most lenient view which can be taken of the trustee's conduct is that both of them have been grossly negligent, and that the grave waste of money which these useless proceedings have entailed is the direct and inevitable result of such gross negligence. It may be that the second defendant, who started these proceedings, is more blameworthy than the first defendant who merely acquiesced in them; but since every one is agreed that I must regard Originating Summons No. 254 of 1940 as a trustees' summons, I find it impossible to distinguish between the first and second defendants in regard to these costs.

Now I have spent much time in consulting all the available text books and books of practice which deal with the subject of trustees' costs, and amongst them are Lewin on Trusts 14th edition, Underhill's Law of Trustees 9th edition, Godefroi on Trusts and Trustees 5th edition, Halsbury's Laws of England 2nd edition, and the Annual Practice 1941 edition. They use somewhat different language in describing the principles which the decided cases have established, but for my purposes I think that those principles can be reduced to one simple proposition, which is this:— Trustees are not to be ordered to pay the costs of legal proceedings affecting the trust estate unless such legal proceedings are the result of their own serious misconduct or gross negligence.

I have consulted a great number of cases on the subject, but I will only refer to seven of them. Taken in chronological order those seven cases are as follows:—

Bartlett v. Wood[2]. In that case an infant beneficiary, suing by his father and next friend, had by his conduct of an administration suit caused much unnecessary expense. The facts are therefore in no way similar to the facts of this case, but there is one passage in the judgment of Westbury L. C. which appears to me to be applicable to all legal proceedings which involve trust estates in costs and expenses. Said Lord Westbury:—

"From my long experience in this court I have observed that nothing requires to be more carefully directed or attended to than the mode in which the costs of litigation should be dealt with by this Court in ordinary cases. Nor is there anything which opens the doors of the Court so widely, and induces persons to come up with unfounded litigation more than the unfortunate degree of uncertainty which exists upon the subject of the payment of costs. I have had occasion to observe upon the general rule, and it is one from which most undoubtedly, so far as I am concerned, I shall seldom depart—namely, that in contentious cases the costs of the litigation must be considered as following the result of it. There can be no doubt that, as a general rule, in cases of administration, it is, above all things, the bounden duty of the Court to attend to the subject of payment of costs, and that no costs ought to be given out of an estate, except for those proceedings only that are in their origin directed, with some show of reason and a proper foundation, for the benefit of the estate, or which have in their result conduced to that benefit."

This passage which I have just set out was cited with approval and applied in *Croggan v. Allen*[3] and *Re Ormston, Goldring v. Lancaster*,[4].

Re Cabburn, Gage v. Rutland[5]. In that case an executor and trustee instituted an unnecessary action for the administration of his testator's estate, alleging unfounded doubts as to the true construction of the will and other imaginary difficulties. He was ordered to pay the costs of the action personally, and in the course of his judgment Bacon V. C. said: "This court will not allow — will not under any circumstances endure — that the process of the court, with all its expensive machinery, should be put in motion unless there is a just and proper reason for the Court so doing". I venture to think that that principle may very properly be applied to some of the proceedings in relation to testate and intestate estates which are so frequently instituted in the Supreme Court of this Colony.

In re Blake, Jones v. Blake[6]. In that case the main question raised was whether, in view of the new practice of the court, for example Order 65 rule 1 (on which our Order 62 rule 1 is based), an infant interested in the estate of a deceased person was entitled, as a matter of course, as under the old practice, to an administration judgment at the expense of the estate. It was held very definitely that he was not, and it was stated that the Court, in the exercise of its discretion as to costs under Order 65 rule 1, will order the plaintiff — if an infant, then his next friend — to pay the costs of any unnecessary or improper administration proceedings personally. I will quote one short passage from the judgment of Cotton L. J. which appears to me to be applicable to the facts of this case:—

"In my opinion, if parties come and wrongfully ask the Court for an administration judgment or a part of one, then they ought in the end, when the action is found to have been unnecessary, to be made to pay the costs of it: of course the costs in each case will be within the discretion of this Court: but that in my opinion is the rule on which the Courts ought to proceed so as to check unnecessary and, still more, vexatious litigation."

Brown v. Burdett[7]. That was an administration action brought by one executor and trustee against his co-executors and trustees. Proceedings were unreasonably prolonged for a period of over 12 years, and much unnecessary expense was incurred as a result of

the negligent conduct of the plaintiff's solicitor. Kay, J. ordered that a portion only of the costs allowed by the Taxing Master to the several parties, including the plaintiff, should be paid out of the estate, and the Court of Appeal affirmed his decision. I will quote two short passages from his judgment.

The first is this:—

"The Court has always had and exercised the power of making executors personally liable for the costs of useless and improper litigation even in an administration suit: Lowson v. Gopeland 2 Bro. C.C. 156."

The second is this:—

"The time and trouble which have been given to this case will not be in vain if these two points are established and brought to the notice of the profession and suitors: 1. The Court will not permit the costs occasioned by improper litigation, or by the negligent conduct of administration proceedings, to be paid out of an estate under its care. 2. The amount of costs allowed by a Taxing Master, as between the client and his solicitor, is not conclusive of the amount which the Court will allow out of the estate."

This passage was quoted with approval by the Court of Appeal, and seems to me to be very much in point in these proceedings.

In re Weall, Andrew v. Weall,[8]. In that case the trustees under a will employed a solicitor to collect certain rents, and allowed him to deduct from those rents certain costs. The tenant for life brought an action against the trustees, alleging that some of the costs were chargeable against corpus and not against income, and that other of the costs has been unnecessarily incurred. The learned Judge, Kekewich J., held that none of the costs which gave rise to the litigation were payable out of income as distinguished from corpus, and that, almost precisely to the extent contended for by the tenant for life, they were not chargeable against the trust estate at all. He also ordered the trustees to pay the costs of the action personally, on the substantial ground that their attitude towards the tenant for life had been wholly wrong, and had occasioned the action. I will quote one short passage from his judgment, which was intended to be, and appears to be, of general significance. Said the learned Judge:—

"One other general remark before applying these principles to the particular case. Trustees deserve and receive the utmost consideration at the hands of the Court. They gratuitously undertake duties for the benefit of others, and as regards costs and otherwise they are entitled to generous treatment. But cestuis que trust also have their rights, their claim to consideration. The trust property is theirs, managed for their benefit, and on the trial of a question between them and their trustees, by whom costs are to be borne, they may fairly require something more to be proved than absence of dishonesty. They must not complain of mistakes or errors in judgment, but reasonable prudence is not too much for them to require."

I do not think it can be contended that the trustees in this case acted with reasonable prudence in the matter of Originating Summons No. 254 of 1940.

In re Skinner, Cooper v. Skinner[9]. That was an Originating Summons, taken out by a beneficiary against the executors and trustees, asking for an account of the testator's estate and administration thereof so far as might be necessary. Farwell J. ordered two of those executors and trustees to pay the costs of taking such account personally on the ground that their conduct amounted to gross neglect. He cited, with approval, a passage in the judgment of Sir George Jessel M. R. in *Heugh v. Scard,*[10] in the course of which that learned Judge said:—

"In certain cases of mere neglect or refusal to furnish accounts, when the neglect is very gross or the refusal wholly indefensible, I reserve to myself the right of making the executor or trustee pay the costs of litigation caused by his neglect or refusal."

In re England, Dobb v. England[11]. In that case a trustee brought an action in the name of himself and his co-trustee to recover damages for dilapidations from the tenants of a house which formed part of the trust property. He commenced the action without consulting his co-trustee or the beneficiaries under the settlement, and continued it, under counsel's advice, after the defendants had paid £110 into Court is satisfaction of all claims. In the result he obtained less than the amount paid into Court, and was ordered to pay the defendants costs as from the delivery of their defence. Eve J. refused to allow the trustee any of those costs out of the estate.

I have already mentioned the costs which have to be provided for; they are the plaintiffs' costs of and incidental to this Originating Summons, No. 254 of 1940, and the costs of the solicitors and advocates who were appointed to represent various classes of persons by the order of the 4th of November 1940. It cannot be denied that the proceedings instituted by this Originating Summons were instituted unreasonably, and for that reason Order 62 rule 1 gives me a discretion in deciding by whom these costs shall be paid.

In exercising that discretion I can at least claim to have gone into the whole matter very thoroughly and to have arrived at my decision there anent only after a prolonged and anxious consideration of the

circumstances in which these proceedings were instituted and the legal principles applicable thereto. The result is this:— a clear opinion on my part that the defendant trustees must pay all these costs personally, because all these costs have been occasioned by their own gross negligence in the discharge of their fiduciary duties.

Two small matters remain for me to dispose of. Mr. Laycock, who appeared with Mr. Mallal for the plaintiffs, asked me to certify for two counsel on the ground that the questions which he would have argued, had argument been permissible, were sufficiently difficult to justify two counsel to argue them. In 1920, however, one counsel was sufficient to argue them; and I feel confident that what Mr. Koek or Mr. Everitt could do in 1920, Mr. Laycock can accomplish to-day. The other small matter arises out of Somah Basapah's attendance on these proceedings in his personal capacity, and at his own risk as to costs. His contingent risk in that respect has now become a certainty.

Order Accordingly.